MCMURRY OIL CO.

IBLA 99-364 Decided October 11, 2000

Appeal from a decision of the State Director, Wyoming, Bureau of Land Management, declining to render final decision on an application for permit to drill an oil and gas well. WYW-141883.

Reversed.

1. Appeals: Generally--Rules of Practice: Appeals: Effect of

When an appeal is filed with the Board of Land Appeals, subject matter jurisdiction is lodged with the Board, suspending the authority of the deciding official to exercise further decisionmaking jurisdiction over matters directly relating to the subject of the appeal. However, it does not have the effect of suspending the deciding official's authority to act on matters that are functionally independent from the subject of the appeal.

APPEARANCES: John F. Shepherd, Esq., and Charles P. Henderson, Esq., Denver, Colorado, for appellant; Andrea S.V. Gelfuso, Esq., and Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The McMurry Oil Company (McMurry) has appealed a July 1, 1999, decision issued by the State Director, Wyoming, Bureau of Land Management (BLM), declining to render a final decision on McMurry's application for a permit to drill (APD) the "Yellow Point No. 8-12" oil and gas exploratory deep test well in the Jonah Field, within oil and gas lease WYW-141883.

McMurry holds a record title interest in lease WYW-141883. On January 25, 1999, McMurry filed an APD, proposing to drill the Yellow Point No. 8-12 well in the SE¼NE¼ sec. 12, T. 28 N., R. 109 W., Sixth Principal Meridian, Sublette County, Wyoming. The well site is in the Jonah Field, which is producing from the Lance formation. The proposed well was to be drilled to a depth of 20,000 feet to test the deeper Frontier formation,

and would be completed in the Dakota formation. McMurry has stated that the well would be the "first test of the Frontier formation in the Jonah Field." (Statement of Reasons for Appeal (SOR) at 3.)

In his July 1999 decision, the State Director declined to act upon McMurry's APD for the Yellow Point No. 8-12 well. He explained that an appeal from an April 27, 1998, decision approving the "Jonah II Natural Gas Development Project" (Jonah II Project) was pending before this Board. 1/ He noted that BLM would be required to undertake a separate environmental review before adjudicating McMurry's APD because the well proposed by McMurry would be the ninth well in sec. 12, thus exceeding the 80-acre spacing (eight wells per 640-acre section) BLM had examined in the Jonah II Project environmental impact statement (EIS).

The State Director stated that BLM could undertake the environmental review, but it was precluded from adjudicating the APD and rendering a final decision until this Board either rules on the pending appeal, or rules that the BLM has the jurisdiction to act upon McMurry's APD while the Wyoming Audubon appeal is pending. The State Director noted that BLM would undertake its environmental review, but defer making a final decision regarding the APD. McMurry appealed.

McMurry contends that the State Director erred by declining to rule on its APD for the Yellow Point No. 8-12 well, and raises two arguments in support of this contention. The first is that, there being no stay of the State Director's April 1998 decision approving the Jonah II Project pending appeal, BLM has the jurisdiction to act upon oil and gas operations in the Jonah Field. (SOR at 3-6.) It asserts that, not being stayed pending appeal, the Jonah II Project can proceed, and it makes no sense to consider BLM to be barred from approving another proposed operation in the same area, even though the approval might be construed as a deviation from the conditions set out in the Jonah II Project, because that project is based on 80-acre, not 40-acre, spacing. Id. at 1-2, 5-6. Rather, McMurry states: "[I]n the case of approved oil and gas operations that are in full force and effect, BLM needs to retain jurisdiction to manage and, if necessary, modify those operations." Id. at 5.

McMurry's second argument is that, had the effect of the State Director's April 1998 decision approving the Jonah II Project been stayed pending the appeal of that decision, under well-established Board precedent BLM has jurisdiction to act on its APD, because an APD is "'functionally independent' from the subject of the [Jonah II Project] appeal." (SOR at 6 (quoting from Robert B. Bunn, 102 IBLA 292, 297 (1988)); see SOR at 6-8.)

1/ That appeal, from the approval of the Jonah II Project, a large-scale (450 wells) oil and gas drilling program in the Jonah Field, was filed by Wyoming Audubon and Linda B. Rawlings, and docketed by the Board as IBLA 98-337. It is hereafter referred to as the Wyoming Audubon appeal.

McMurry bases this assertion of functional independence on the fact that, although the project and proposed well are in the Jonah II Project area, the Jonah II Project was for full-field development of the Lance formation, and the well proposed in its APD was an exploratory test of the Frontier formation, an entirely different formation. Id. at 7. McMurry also notes that BLM recognized that its proposed well was beyond the scope of the Jonah II Project.

McMurry concludes that, by delaying a decision on its APD, the State Director is acting to the "detriment of lessees, the United States, and the State of Wyoming (which shares in royalty revenues from oil and gas production)." (SOR at 2.)

On October 22, 1999, the Board rendered a decision in Wyoming Audubon, addressing the merits of an appeal challenging the State Director's April 1998 decision approving the Jonah II Project, and affirming the State Director's decision. Wyoming Audubon, 151 IBLA 42 (1999). BLM may now adjudicate McMurry's APD, as the reason for not processing that application has been removed. Nonetheless, the propriety of the State Director's July 1999 decision to not adjudicate McMurry's APD is still before the Board. The fact that this raises an issue likely to recur militates against dismissal of the appeal as moot. See Desert Vipers Motorcycle Club, 142 IBLA 293 (1998).

[1] When the State Director issued his July 1999 decision BLM had not adjudicated the APD and rendered an appealable final decision. In his July 1999 decision, the State Director held that "BLM cannot render a decision on [the] proposed Application for Permit to Drill the Yellow Point 8-12 well," until the Board decided a pending appeal or ruled that BLM had the jurisdiction to do so. (Emphasis added.) This case does not present a question regarding whether BLM properly exercised its authority when adjudicating McMurry's APD for the Yellow Point No. 8-12 well. The question is whether BLM had the authority to adjudicate McMurry's APD when the July 1999 decision was issued.

When an appeal is properly taken from a BLM decision, BLM loses jurisdiction over the subject matter of the decision on appeal, and can no longer take any action to modify that decision. The Ecology Center, 147 IBLA 66, 68 n.3 (1998); Clive Kincaid, 111 IBLA 224, 234 (1989); Melvin N. Barry, 97 IBLA 359, 361 (1987); James C. Mackey, 96 IBLA 356, 362, 94 I.D. 132, 136 (1987); Sierra Club, 57 IBLA 288, 291 (1981); James T. Brown, 46 IBLA 265, 271 (1980); State of Alaska v. Patterson, 46 IBLA 56, 59 (1980). As discussed in greater depth below, BLM's ability to exercise subject matter jurisdiction does not depend upon whether this Board has stayed the effect of a decision pursuant to 43 C.F.R. § 4.21(a).

BLM correctly noted that it had the authority to continue work contemplated under the Record of Decision (ROD) approving the Jonah II Project. (Answer at 4.) That is, the Jonah II Project decision had authorized drilling of up to 450 wells in the Jonah Field to develop production

of gas from the Lance formation, and BLM could approve individual APD's for those wells. However, BLM could not amend or rescind the State Director's April 1998 decision approving the Jonah II Project while that decision was on appeal without the specific approval of this Board. 2/ During the period that the appeal was pending BLM was prevented from taking "[a]ny [dispositive or other] adjudicative action * * * relating to the subject matter of the appeal," since it lacked the jurisdiction to do so. Sierra Club, 57 IBLA at 291; see The Ecology Center, 147 IBLA at 68 n.3; Clive Kincaid, 111 IBLA at 234; Melvin N. Barry, 97 IBLA at 361; James C. Mackey, 96 IBLA at 362 n.4, 94 I.D. at 136 n.4; Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371, 374-75 (1985); James T. Brown, 46 IBLA at 271. BLM could act to implement the decision (in the absence of a stay). However, it could not alter the State Director's April 1998 decision.

Eight wells had been drilled in sec. 12, T. 28 N., R. 109 W., Sixth Principal Meridian, Sublette County, Wyoming, prior to the State Director's July 1999 decision to suspend consideration of McMurry's APD. (Memorandum to Field Manager, Pinedale Field Office, Wyoming, BLM, from Chief, Wyoming Reservoir Management Group (WRMG), BLM, dated April 30, 1999 (WRMG Memorandum) ("[Sec. 12] already has eight wells on 80-acre spaced locations"); see "Figure 1" (U.S. Geological Survey Topographic Map) attached to Letter to State Historic Preservation Officer from Acting Field Manager, dated March 30, 1999.)

When describing the Jonah II Project, BLM stated that the Project consisted of: "The construction of up to 450 additional natural gas well locations * * * on BLM-administered lands as proposed for the Jonah II Project area. The Jonah II Operators will drill wells on not less than 80-acre spacing over the next ten to fifteen years." (Ex. 2 attached to SOR (ROD), Jonah Field II Natural Gas Development Project EIS, dated April 1998) at page "3"; see Wyoming Audubon, 151 IBLA at 49 ("eight wells per section").) BLM concluded that, to approve McMurry's APD, and authorize a well not contemplated in the Jonah II Project, it would have to amend the 80-acre spacing approved by the State Director in his April 1998 decision.

We find it equally important that the EIS also states that "[t]he Lance Formation is targeted for gas production by this project * * *. The geologic formations underlying the [Jonah II Project area] would

---

2/ It is important to note that the effect of the Board's denial of the stay petition in Wyoming Audubon, thus allowing the Jonah II Project to go forward, did not permit the drilling of the Yellow Point No. 8-12 well to proceed. Since such activity was not authorized by the State Director in his April 1998 decision approving the project, the lifting of the stay did not allow the drilling of that well to proceed. Nor did the lifting of the stay somehow authorize the well drilling or even require BLM to approve the particular APD for that well.

not be adversely affected by the proposed project and, therefore, are not further discussed in this EIS." (Ex. 2 to SOR at 3-8.) BLM and McMurry agree that approval of a permit to drill a well to produce gas from the Jonah Field (as that term is used in the decision and underlying EIS), which would result in well spacing less than 80-acre spacing is "not part of the drilling program approved by the Jonah II [decision]," and to do so would run contrary to that decision. (SOR at 3; see BLM Answer at 2-3.) To authorize closer spacing would require an amendment of the State Director's April 1998 decision approving the Jonah II Project. This could not be done by BLM while the appeal was pending. Thus, if approval of the APD for the Yellow Point No. 8-12 well would cause BLM to deviate from 80-acre spacing called for in the Jonah II Project decision, BLM would not have the subject matter authority to approve the APD. 3/

> We have long held that the suspension of BLM's authority to act during the pendency of an appeal is limited:
>
> The effect of 43 C.F.R. § 4.21(a) is only to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal. It does not have the effect of suspending BLM's authority to act on matters that are functionally independent from the subject of the appeal.

102 IBLA at 297 (citing East Canyon Irrigation Co., 47 IBLA 155 (1980)). Bunn and East Canyon address BLM's authority to act or implement its decision during the period that the effect of a challenged BLM decision is stayed. 4/

Bunn and East Canyon Irrigation Co. give strong guidance regarding the limits of BLM's authority and subject matter jurisdiction during the

---

3/ During the pendency of the Wyoming Audubon appeal before this Board, BLM could have asked the Board to restore sufficient jurisdiction to allow it to rule on McMurry's APD. If it had made this request, the Board would have considered any objection by the appellants and whether to grant the needed jurisdiction. A favorable ruling would have restored sufficient authority to authorize 40-acre spacing and approve the APD (in the absence of any other impediment thereto). See Great Basin Mine Watch, 146 IBLA 248, 249-50 (1998) (citing Order, Great Basin Mine Watch, IBLA 96-307, dated Mar. 25, 1998, at 3-4); Clive Kincaid, 111 IBLA at 234; Melvin N. Barry, 97 IBLA at 361; Benton C. Cavin, 83 IBLA 107, 114 (1984) (citing Order, Owyhee Cattlemen's Association, IBLA 80-556, dated Nov. 25, 1980); Warren D. Elmore, 42 IBLA 91, 92 (1979).

4/ When Bunn and East Canyon were decided, 43 C.F.R. § 4.21(a) provided for an automatic stay when an appeal was filed, which continued during the entire pendency of the appeal. Effective Feb. 18, 1993, the Department revised 43 C.F.R. § 4.21(a), dispensing with the automatic stay.

pendency of an appeal. If a matter has not actually been decided in the BLM decision on appeal, even a stay cannot operate to prevent BLM from taking action concerning that matter. Similarly, the transfer of jurisdiction on appeal cannot operate to prevent BLM from taking action on a "functionally independent" matter not on appeal.

In Bunn, the issue was whether BLM could adjudicate an oil and gas lease offer for a portion of the lands subject to an offer when a decision to reject the offer as to another tract was on appeal to the Board. We concluded that BLM had jurisdiction over the lands sought in an oil and gas lease offer during the 30-day period allowed for filing an appeal from its rejection of the offer for other lands. Robert B. Bunn, 102 IBLA at 297. The adjudication of the lease offer as to the accepted lands could take place without contradicting BLM's earlier adjudication of the offer as to the rejected lands, which could be appealed to the Board.

In East Canyon, the issue was whether BLM could adjudicate an application for an extension of a temporary use permit when its decision to reject right-of-way applications in the same area was on appeal. We held that BLM had the subject matter jurisdiction to act because the proposed action was functionally independent of the subject matter on appeal, and concluded that BLM could adjudicate an extension of an existing special land use permit for an exploratory water well during a pending appeal from BLM's adjudication of applications for rights-of-way for existing and proposed water wells and related facilities. East Canyon Irrigation Co., 47 IBLA at 170. The adjudication of the use permit could take place without contradicting BLM's earlier adjudication of the right-of-way applications.

It is not material to a finding in this case that, on July 1, 1999, the Board had subject matter jurisdiction regarding the Jonah II Project or that the Wyoming Audubon case raised factual or legal issues likely to impact BLM's adjudication of McMurry's APD. The Board does not assume subject matter jurisdiction to avoid having BLM decisions conflict with a subsequent Board ruling. For example, we are not concerned about the physical and temporal proximity of the wells contemplated in that project to special sage grouse areas and activities. See discussion in Wyoming Audubon at 151 IBLA at 44. However, we are intent upon preserving the Board's jurisdiction over the subject matter on appeal, that is, jurisdiction over what was decided in the decision on appeal. Thus, BLM can change its mind, but it cannot change any aspect of the decision on appeal until jurisdiction is restored to it.

The proposed well would be located in the same area as the Jonah II Project, and would have many of the same environmental impacts as the existing and contemplated wells in that project. However, as McMurry properly notes, the proposed well would be drilled to test an entirely different and yet to be proven geologic formation, which happens to be in the same geographic area as the Jonah Field. An 80-acre spacing was adopted for production from the Lance formation, and the stated purpose

for the Jonah II Project was to develop gas production from the Lance formation, and production from other formations was not addressed in the EIS or considered when developing the 80-acre spacing for the Lance formation.

Oil and gas spacing requirements are established to regulate the number and location of wells producing from an oil or gas reservoir in order to prevent waste and injury to the reservoir which could result from disproportionate withdrawal of the oil or gas from the reservoir. Therefore, well spacing is a function of the reservoir for which the spacing is established. For example an oil pool in a specific geologic formation may have an 80-acre spacing and a gas pool (field) which is in the same geologic formation, but which is geographically separate may have a 360-acre spacing. If the oil field and the gas field are geographically separated, there would be no apparent question or conflict. When the gas formation and the oil formation happen to be in the same geographic area but are geologically separate, and are therefore two pools at different depths, the outcome should be the same. The spacing for the gas would not limit the number of wells on the oil formation and the spacing for the oil formation could not be used to justify drilling more wells in the gas formation. Approval of the APD for the Yellow Point No. 8-12 well did not hinge on approval of the Jonah II Project. Adjudication of the permit to drill the Yellow Point No. 8-12 well to test the Frontier formation could proceed independent of any determination regarding whether to proceed with the full field development of the Lance formation (i.e., the Jonah II Project).

BLM had the jurisdiction to adjudicate the APD for the Yellow Point No. 8-12 well regardless of the outcome of the appeal of the State Director's April 1998 decision approving the Jonah II Project. BLM recognized that it had the jurisdiction to undertake an environmental review of the proposed Yellow Point No. 8-12 well, assessing the potential cumulative impacts of drilling the Yellow Point No. 8-12 well and related activity, together with drilling and related activity in conjunction with the Jonah II Project, as well as other individual impacts associated with the particular well. It simply did not matter, for purposes of the review, whether the project ever actually went forward, since BLM is charged by section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(c) (1994), and its implementing regulations (40 C.F.R. Chapter V), with considering the likely cumulative impacts of a proposed action together with other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7; Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). Clearly, at the time of the State Director's July 1999 decision, the Jonah II Project was a reasonably foreseeable future action.

Further, the cumulative and individual impacts needed to be addressed in a supplement to the Jonah II Project EIS or, at least, an environmental assessment, since that EIS only considered the drilling of wells in the

Jonah Field based on 80-acre spacing. Drilling the Yellow Point No. 8-12 well or any other well outside the scope of the original EIS would require separate review.

That BLM could have undertaken the necessary environmental review is admitted by the State Director, who, while declining to rule on the APD, stated in his July 1999 decision that BLM would go forward with the environmental review, despite the pending appeal. Moreover, following that environmental review, BLM could have decided, based on that assessment, whether to approve the APD for the well, and that decision would be appealable to this Board. Nothing prevented such action, especially since the matter at issue was, plainly, functionally independent of the larger Jonah II Project.

Prudence might dictate that BLM not act on the APD for the Yellow Point No. 8-12 well when an appeal from the State Director's April 1998 decision approving the Jonah II Project is pending. It might be wise to not approve an APD, based in part on an assessment of the cumulative impacts of a single well and an extensive drilling program in the same area, until the Board reviews BLM's assessment of the cumulative impacts of the larger project. If the Board were to rule that the assessment of the cumulative impacts of the larger project was legally deficient that decision would have a direct bearing on the assessment of the cumulative effects of the larger project and the proposed McMurry well. It may well be prudent for BLM to wait until the Board ruled on the pending appeal. However, nothing actually precluded the State Director from adjudicating the APD and rendering a final decision.

Jurisdiction over the subject matter of the McMurry APD was not lodged with the Board when Wyoming Audubon and Rawlings appealed the State Director's April 1998 decision approving the Jonah II Project, and it was not with the Board when the State Director issued his July 1999 decision declining to adjudicate the APD. Thus, the State Director erred when holding that BLM must await Board action, either by deciding the appeal or ruling on the jurisdictional question. The State Director had the jurisdiction to render a decision on McMurry's APD for the Yellow Point No. 8-12 well.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

_____
R.W. Mullen
Administrative Judge

I concur:

_____
C. Randall Grant, Jr.
Administrative Judge